

January 26, 2015

Joe Panora
364 Hansen Circle
Folsom, CA 95630

Re: Your Request for Informal Assistance
Our File No. I-15-002

Dear Mr. Panora:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”).¹ This letter should not be construed as assistance on any conduct that may have already taken place (Regulation 18329(c)(4)(A)), and is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) We offer no opinion on the application of laws other than the Act, such as the post-employment provisions of Public Contract Code Section 10411. Finally, because your questions are general in nature, we are treating your request as one for informal assistance.²

QUESTION

What restrictions will be placed on your future employment activities as a result of your former employment with the California Department of Corrections and Rehabilitation (the “CDCR”)?³

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

³ The information contained in this letter provides guidance for the more specific questions listed in your request for advice.

CONCLUSION

The restrictions that exist based on your former employment with the CDCR include the permanent ban on switching sides and the one-year ban, both of which are explained in detail below.

FACTS

On December 30, 2014, you retired from the CDCR where you were the Director of the Enterprise Information Services ("EIS"). In that position, you had authority for overseeing all of the information technology for the CDCR. You are now considering working for a private company in the technology industry or establishing your own business that will consist of technology, strategic procurement and project advisory services representing companies doing business with state, federal and local government entities.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act, colloquially known as the "revolving door" prohibitions. In addition, Section 87407 prohibits officials from making, participating in making, or using their position to influence decisions affecting persons with whom they are negotiating employment, or have any arrangement concerning employment. Because you have already left state service, we only address the "revolving door" prohibitions.

One-Year Ban

The "one-year ban" prohibits a former state employee from making, for compensation, any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative actions⁴ or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (See Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency's conflict-of-interest code.

⁴ For purposes of Section 87406, the Act defines "administrative action" and "legislative action" as the following:

"'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding" (Section 82002(a).)

"'Legislative action' means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. 'Legislative action' also means the action of the Governor in approving or vetoing any bill." (Section 82037.)

(Section 87406(d)(1); Regulation 18746.1(a)(2).)⁵ The ban applies for twelve months from the date the employee permanently leaves state office or employment. While in effect, the one-year ban applies only when a former employee or official is being compensated for his or her appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban, which only applies to “judicial or quasi-judicial” proceedings, the one-year ban applies to “any appearance or communication made for the purpose of influencing administrative or legislative action or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (Regulation 18746.1(b)(5).) An appearance or communication is for the “purpose of influencing” if it is made for the “principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (Regulation 18746.2.) An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Ibid.*)

Finally, appearances and communications are prohibited only if they are (1) before a state agency that the public official worked for or represented, (2) before a state agency “which budget, personnel, and other operations” are subject to the control of a state agency the public official worked for or represented, or (3) before any state agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor’s office during the twelve months before leaving state office or employment. (Regulation 18746.1(b)(6).)

However, not all communications are prohibited by the one-year ban. Appearances or communications before a former state agency employer, made as part of “services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the [one-year] prohibitions . . . provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings.” (Regulation 18746.1(b)(5)(A); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.)

Additionally, Regulation 18746.2(b)(1)-(4) provides that appearances or communications are not restricted under the one-year ban, if an individual:

- “(1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;
- “(2) Attends a general informational meeting, seminar, or similar event;
- “(3) Requests information concerning any matter of public record; or

⁵ A governmental employee should be designated in his or her agency’s conflict of interest code if the employee makes or participates in making governmental decisions that have a reasonably foreseeable material effect on any financial interest. (Section 87302.)

“(4) Communicates with the press.”

Without violating the one-year ban, a former agency official may also draft proposals on a client’s behalf to be submitted to the official’s former agency so long as the former official is not identified in connection with the client’s efforts to influence the agency. (*Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289.) Similarly, a former agency official may use his or her expertise to advise clients on the procedural requirements, plans, or policies of the official’s former agency so long as the employee is not identified with the employer’s efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

As the Director of the EIS at the CDCR, we assume you were required to file an annual Statement of Economic Interests (Form 700). As a result, if you begin working for a private company, you will be prohibited for a one-year period from making appearances and communications before the CDCR, or any other state agency “which budget, personnel, and other operations are subject to the control” of the CDCR, on behalf of the private company, if made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

As stated above, however, should you work for a private company, you will not be prohibited from making appearances or communications before the CDCR that are made as part of “services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement . . . provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings.” (Regulation 18746.1(b)(5)(A).) Nor would you be prohibited, for example, from assisting the private employer behind the scenes in drafting a contract proposal so long as you are not identified in any way when the proposal is submitted.

On the other hand, if you establish your own business, the prohibitions just discussed under the one-year ban may not apply. The one-year ban applies where a former designated employee makes an appearance or communication in representation of another person. As such, appearances or communications before the CDCR would not be prohibited where they are made in representation of your personal interests, which include a business entity wholly owned by you or your immediate family members, or a business over which you exercise sole direction and control. (Regulation 18702.4.)

Permanent Ban

The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication—or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication—made with the intent to influence any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official. “‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . .” (Section 87400(c).)

Additionally, an official is considered to have “participated” in a proceeding if he or she took part in the proceeding “personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information . . .” (Section 87400(d).) A former state official who held a management position in a state administrative agency is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during his or her tenure, and (2) the proceeding was under his or her supervisory authority. (Section 87400(d); Regulation 18741.1(a)(4).) However, proceedings are not under an official’s “supervisory authority” merely because the supervisor is responsible for the general oversight of the administrative actions or functions of a program, where the responsibilities concerning the specific or final review of the proceedings are expressly delegated to other persons in the agency’s structure and the supervisor is not involved in the actual proceedings. (Regulation 18741.1(a)(4); see also *In re Lucas* (2000) 14 FPPC Ops. 15.)

Furthermore, “[t]he permanent ban does not apply to a ‘new’ proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A ‘new’ proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings.” (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) New contracts with the employee’s former agency in which the former employee did not participate are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) A new contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and awarding of a contract, license, or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.)

While we have detailed the general provisions of the permanent ban for your review, you have not provided any information related to your participation in any particular proceeding while employed with the CDCR that may affect your ability to engage in any of the conduct listed herein. To apply the permanent ban to your situation, you need to determine if any of the actions in which you may engage on behalf of a private employer, or your own company, involve a proceeding in which you previously participated. (Regulation 18741.1(a)(4).)

For example, if you were involved in drafting or negotiating any particular contract concerning information technology as an employee of the CDCR, you have previously participated in a “judicial, quasi-judicial or other proceeding” and are permanently barred from “switching sides” and participating in the same proceeding on behalf of a private company, including one that you own. If you need additional assistance relating to a specific proceeding in which you previously participated, you should seek further advice providing all relevant facts.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

John W. Wallace
Assistant General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl